IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19835 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

NAKHTRANA TALUKA PANCHAYAT - Petitioner(s)

Versus

BHARATKUMAR H TILAK - Respondent(s)

==========

Appearance :

MR PREMAL R JOSHI for Petitioner(s) : 1,
MR HJ NANAVATI for Respondent(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 14/10/2005

ORAL JUDGMENT

1. Rule. Learned advocate Mr. H.J.Nanavati waives service of Rule on behalf of respondent. At the joint request of learned advocates appearing for both the

parties, petition is taken up for final disposal today.

2. In the present petition, the petitioner Panchayat has challenged the legality of an award dated 19/5/2005 passed by Labour Court, Bhuj. By the impugned award, reference of the respondent workman was allowed. Termination of the respondent was set aside. He was directed to be reinstated in service with 100% back wages.

3. Before the Labour Court, the case of the respondent was that he had worked with the petitioner right from 1981. His services were terminated illegally w.e.f. 31st July, 1992 without following any procedure. Before the Labour Court, respondent produced several documents to suggest that he was discharging duties in a work charge establishment as a Clerk cum Driver and his services were terminated. To establish his case he also examined himself as a witness.

4. From the documents produced, it can be seen that there is hardly any dispute about the fact that the respondent was discharging duties in different periods right from December, 1981. There is no dispute about the

fact that the services were terminated w.e.f. 31/7/1992. There is also no dispute that before terminating the services of the respondent no notice or notice pay or retrenchment compensation was paid to him. The case of the petitioner is that the respondent was engaged for scarcity work and that upon winding upon of such work, he was terminated from service. Such termination need not be followed by the procedure laid down under Section 25-F of the Industrial Disputes Act. Learned advocate Shri Joshi appearing for the petitioner placed reliance on the decision of this Court in the case of **J.J.Shrimali vs. District Development Officer, Mehsana & Ors. Reported in 1989 (1) GLR page 396**, wherein Division Bench of this Court held that where due to famine and drought conditions, scarcity relief works are undertaken and some persons are employed on an express understanding that their appointments are absolutely temporary and on an ad hoc basis, termination of their services does not amount to retrenchment, and the employees are not entitled to wages for notice period and compensation. Reliance was also placed on the decision of Full Bench of this Court in **H.K.Makwana vs. State of Gujarat and Ors. Reported in 1994 (2) GLR 1002**, wherein also similar view was taken.

5. On the other hand learned advocate Mr. Nanavati appearing for the respondent suggested that no where in any of the appointment orders of the respondent was it indicated that he is being engaged for scarcity work. He submitted that the respondent was engaged almost through out from 1981 till his termination on 31/7/1992. Incidentally, the fact that scarcity related work was being taken from the workman does not mean that he was engaged for scarcity relief project and his termination can be brought about validly without following the provisions of Section 25-F of the Industrial Disputes Act.

6. Having considered the rival contentions and having perused the material on record, I do not find that the Labour Court committed any error in declaring the termination of the respondent as illegal. Respondent had produced several documents in form of certificates issued by the authorities as well as certain appointment orders to demonstrate that he was working almost continuously from 1981 onwards. It is, therefore, not possible to accept that he was engaged against scarcity work. In none of the appointment orders or certificates issued to him, it was indicated that he is engaged for scarcity

related work. In fact the last appointment order on record was one issued on 1st February, 1992. It was only in this order the word 'scarcity' was used for the first time. This order was to be in operation for a period of 29 days. Service of the respondent continued long thereafter till 31/7/1992. Apparently, therefore, he was not terminated under the conditions situated in the order dated 1/2/1992.

6.1 In view of no indication being given to the respondent that he was being engaged for the scarcity work, in view of the fact that he was engaged from 1981 almost through out till July, 1992, the ratio of the decisions cited by the learned advocate Mr. Joshi cannot be applied to the present case.

6.2 In the decision of **S.M.Nilajkar and Ors. vs. Telecom District Manager, Karnataka reported in (2003)4 SCC 27**, the Hon'ble Supreme Court observed that the termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub Clause (bb) subject to the following conditions being satisfied;

(i)that the workman was employed in a project or

scheme of temporary duration;

(ii)the employment was on a contract, and not as a daily-wager simpliciter, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project;

(iii)the employment came to an end simultaneously with the termination of the scheme or project and consistently with the terms of the contract; and

(iv)the workman ought to have been apprised or made aware of the above said terms by the employer at the commencement of employment.

6.3 It was further observed that engagement of a workman as a daily wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or up to the occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. It was further observed that the contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-live and as per the terms of the contract the same was liable to termination

on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore, complain that by the act of the employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the above said ingredients so as to attract the applicability of sub-clause (bb) above said.

7. In the present case, I do not find that the above ingredients were present. The respondent was not put to notice that his services are liable to be terminated by afflex of time or on happening of certain event. In fact he continued with some breaks right from 1981 to 1992. The petitioner, therefore, cannot fall back on the provisions of Section 2(oo)(bb) of the Industrial Disputes Act.

8. The Labour Court has provided for reinstatement and 100% back wages. It is by now well settled that the question of back wages depends upon large number of factors and not just on the workman not being gainfully employed during the intervening period. Learned advocate Mr. Nanavati also submitted that the Court may pass

appropriate order regulating the entitlement of the back wages of the workman.

9. Considering the facts and circumstances of the case while upholding the decision of the Labour Court to strike down the termination and sustaining the directions for reinstatement and continuity in service, entitlement of the workman to receive back wages is reduced to 50%. Subject to above modification, the award of the Labour Court is upheld. Petition is allowed to the above extent. Rule is made absolute with no order as to costs.

(Akil Kureshi, J.)

smita/